

**PRESIDENTIAL POWERS REVISITED: AN ANALYSIS OF
THE CONSTITUTIONAL POWERS OF THE EXECUTIVE
AND LEGISLATIVE BRANCHES OVER THE
REORGANIZATION AND CONDUCT OF THE
EXECUTIVE BRANCH**

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PART I—INTRODUCTION

Two hundred and eighteen years after George Washington was elected to serve as the first President of the United States, the Framers of the Constitution would likely be heartened to know that over a dozen people are vying for the right to run as their party's presidential candidate in the upcoming 2008 presidential election. However, these same Framers would likely be severely disheartened to learn that the powers and responsibilities assigned to the executive branch and the President of the United States—an office which these dedicated men created and shepherded through a vehement anti-Constitution protest—have been eroded. Indeed, many of the key points which the Framers cited as evidence of and reasoning for the tripartite system they devised have been whittled away by constant intrusion into the powers and responsibilities of the President and the executive branch. This intrusion has become increasingly commonplace and accepted by a broad spectrum of governmental and political actors. It has wide-ranging legal, security, and societal implications which, unfortunately, are not always easily summed up in a television sound bite. Although perhaps not as glamorous or headline-grabbing as the day's congressional bickering among itself and with the President, the problems created by congressional overreach into the executive branch are myriad. To demonstrate the scope and depth of these problems, there is perhaps no better question than to explore the history and future of executive branch reorganizations with particular attention paid to the

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role of national security, military affairs, and foreign affairs in structuring and reorganization attempts.

Part II of this Article starts with an examination of the early history of the powers assigned to the Continental Congress under the Articles of Confederation. From there, this part examines relevant provisions of the Constitution and the Federalist Papers to further understand the executive and legislative entities, which the Framers intended to, and did, create through the ratification of the Constitution.

Part III of this Article then examines the history of executive power to engage in security-based operations under the commander-in-chief powers, as well as military restrictions placed on the President by the Congress and selected points of congressional involvement in issues and policy areas which have been vested in the executive branch. The author has selected an examination of security issues in particular because they demonstrate how a key function of the presidency was regarded and because security-based issues are at the heart of executive branch reorganization attempts which have occurred in the wake of September 11, 2001 and which are likely to occur in the future.

Part IV of this Article discusses various statutes which affect the relationship between the executive and legislative branches and their functions. It goes on to discuss several other tools of national security policy and their relation to the executive and legislative branches.

After the extensive history provided by Parts II, III, and IV, Part V analyzes the information gleaned from history and legal precedent in order to make observations regarding the appropriate border between executive and legislative branch power over the executive branch. Part V concludes that, since the advent of the CIA as an institutionalized entity after World War II, Congresses of all political affiliations have sought to usurp the powers the President holds over his office and the executive branch—particularly in terms of national security—regardless of the President's own political affiliation or the domestic and international situations faced by the United States. Part V also concludes that this precedent is dangerous and violative of the Constitution, and suggests that the way to stop further erosion is for both future Presidents and members of Congress to understand their proper role in the constitutional system which they are, and will be, elected to protect and serve. Ultimately, the business of governing the United States is not about creating a flattering sound bite, about generating campaign images of consensus or assault on an Executive

which might be unpopular; it is about governing the country to the best of one's constitutional abilities within the framework created by the Constitution itself.

PART II – FRAMING THE CONSTITUTION

A. *Articles of Confederation*

While the nation was in its infancy, and fighting for its life, the Constitution had yet to be born. Rather, the nation was governed by two forms of government; a weak federal confederation and a strong state governmental apparatus, which made each state independent from the other and fostered a sense of disunity among the people of the United States of America as a whole.¹ During the Revolutionary War, the state militias fought for the same cause and fought the same enemy, but they were primarily governed by their own states and only loosely by the Continental Congress.² Certainly, this arrangement made sense given that each state had been administered as a separate colony under British rule and the decision as to whether to join the war was made on a state-by-state basis.³

In many ways, the Articles of Confederation were a rough sketch of the constitution. The Articles set out the powers of the Continental Congress and addressed the relationship between the Continental Congress and the states—a relationship in which the states had power not only over the federal apparatus but also each other.⁴ The Articles made provisions for the declaration and pursuit of war.⁵ The Articles addressed certain aspects of interstate commerce.⁶ What the articles did not do, however, was create an executive branch or a strong federal government.⁷ Instead, the office of the President referred to the person elected by the members of the Continental Congress to serve as President of the Congress.⁸ Alternatively, the term “executive” was

1. See THE ARTICLES OF CONFEDERATION (1777), available at <http://www.yale.edu/lawweb/avalon/artconf.htm>.

2. See *id.*

3. See Signers of the Declaration of Independence, <http://www.ushistory.org/declaration/signers/index.htm> (last visited July 15, 2007) (listing the signers of the Declaration of Independence by state delegation).

4. See ARTICLES OF CONFEDERATION, *supra* note 1.

5. See *id.*

6. See *id.*

7. See *id.*

8. See *id.*

used to denote the governor of a state, an office which was endowed with executive powers under the constitutions of the states which formed the confederacy called the United States of America.⁹ By creating an agreement to promote “friendship” between the newly declared independent states, the Articles established a weak method of federal control in favor of strong state independence and the maintenance of states’ rights.¹⁰

The Articles of Confederation survived for several years, but when the immediate needs of the states and the federal institution during wartime subsided, the Articles became in essence subservient to the will of the independent states.¹¹ This allowed states to discriminate against other states,¹² to negotiate with other nations in a manner which advanced their own interests at the expense of the federal whole,¹³ to coin their own money and declare its value,¹⁴ and to commit a host of other acts which were detrimental to the states themselves and the federal construct.¹⁵ Eventually, the need for a reconstituted federal system became apparent to the members of the Continental Congress and others in society, and the Constitutional Convention began.¹⁶

B. Constitutional Provisions

The new Constitution which the Framers devised relied heavily on the precedents established by and provisions of the state constitutions.¹⁷ The state constitutions, in turn, essentially featured slight modifications on the tripartite system of government advocated by Montesquieu: independent executive, judicial, and legislative branches which worked together—and occasionally overlapped—to govern the political entity which they served.¹⁸ There is extensive

9. *See id.*

10. *See id.*

11. *See* THE FEDERALIST NO. 15 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

12. *Id.*

13. *See* THE FEDERALIST NO. 3 (John Jay).

14. *See* THE FEDERALIST NO. 15 (Alexander Hamilton).

15. *Id.*, THE FEDERALIST NO. 3 (John Jay).

16. *See* THE FEDERALIST NO. 1 (Alexander Hamilton).

17. THE FEDERALIST NO. 39 (James Madison) (explaining that the powers, responsibilities, and limits placed on the Executive Branch in the Constitution were derived from various state constitutional provisions governing state executives).

18. *See id.* *See also* Alexandra R. Harrington, *Executive Parity: How the Structure of Executive Branches at the City, State, and Federal Level Impacts Presidents and Presidential Candidates*, 7 APPALACHIAN J.L. ____ (forthcoming 2007), available at

evidence which shows that the Framers' conception of the powers to be vested in each branch was drawn from the structure and content of the state constitutions.¹⁹ This is evident when one examines the structures of both old and new state constitutions relative to the provisions of the federal Constitution.²⁰

The Framers apparently learned many lessons from the way in which the Articles of Confederation were structured and used. While preserving many of the same powers vested in the federal government under the Articles—and expanding several powers—the Framers created the executive branch and imbued it with the war, security, and foreign relations powers, which had previously been vested in the Continental Congress.²¹ In doing so, the Framers expressly removed these areas from their previous jurisdictional home within the legislative branch.²²

The Constitution made the American President the nation's Chief Executive²³ and gave him the power to “take care that the laws be faithfully executed.”²⁴ It vested him with supreme control over the military in his role as Commander-in-Chief,²⁵ and allowed him primacy in negotiating treaties, which implicitly granted power over foreign policy.²⁶ It allowed him to nominate his choices for various governmental posts, which required confirmation and gave him wide-ranging appointment powers for “inferior” governmental posts.²⁷

The legislative branch was tasked with enacting legislation²⁸ and acting as the appropriations body for the federal government.²⁹ It was vested with the power to “raise” armies,³⁰ “support and maintain” them,³¹ and to “provide” for a Navy.³² The Constitution vested the Senate with the ability to give advice and consent on treaties and

http://works.bepress.com/alexandra_harrington/7.

19. THE FEDERALIST NO. 39 (James Madison).

20. See Harrington, *supra* note 18.

21. See U.S. CONST. art. II.

22. Compare U.S. CONST. arts. I, II, with ARTICLES OF CONFEDERATION, *supra* note 1.

23. U.S. CONST. art. II, § 1.

24. *Id.* at § 3.

25. *Id.* at § 2.

26. *Id.*

27. *Id.*

28. U.S. CONST. art. I, § 1.

29. *Id.* at § 8.

30. *Id.*

31. *Id.*

32. *Id.*

nominations for certain officers.³³ The Framers made a distinction between funding military action and overseeing the conduct of military action by vesting these functions in different branches.³⁴

C. *Pre-Ratification Debate*

The extensive public debates surrounding the propriety of the proposed Constitution are historically quite useful in teasing out the legal intent of the Framers in creating the three branches of federal government and vesting them with specific powers. Through the fiery Federalist and Anti-Federalist Papers debate, an understanding of the words in the constitutional provisions began to emerge.³⁵ This understanding is vital to an examination of the appropriate powers of the executive and legislative branches, especially as they relate to control over the structure of the executive branch.

The underlying premise of the new Constitution, as explained through the various authors of the Federalist Papers, was the protection and security of the American people.³⁶ Although it is not explicitly stated, this protection extended to the economic, political, and physical safety of Americans in general, as these topics are the primary sources of debate and discussion in both the Federalist and Anti-Federalist Papers.³⁷ Through the Federalist Papers, it became clear that the Constitution gave the Executive the ability to receive foreign ambassadors, ministers, negotiate treaties, and otherwise conduct foreign policy.³⁸ The Federalist Papers explain that the treaty-making and negotiation provisions of the Constitution were intended to allow the Executive the flexibility necessary to negotiate treaties in secret because secrecy was deemed to be critical to a treaty's success³⁹ and because the intelligence operations, which frequently surrounded treaty negotiations, could only occur under the veil of executive se-

33. U.S. CONST. art. II, § 2.

34. Compare U.S. CONST. art. I, § 8, with U.S. CONST. art. II, § 2.

35. The Federalist and Anti-Federalist papers were published in the years between the promulgation of the draft Constitution and its adoption. In these papers, constitutional proponents and opponents debated the impact of a federal Constitution on the nation and the states. The primary Federalist authors were Alexander Hamilton, John Jay, and James Madison. The primary Anti-Federalist author was Patrick Henry.

36. See generally THE FEDERALIST PAPERS; THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL DEBATES (Ralph Ketcham ed., 1986).

37. See generally THE FEDERALIST PAPERS, *supra* note 36; THE ANTI-FEDERALIST PAPERS, *supra* note 36.

38. THE FEDERALIST NO. 64, at 388-94 (John Jay).

39. *Id.* at 390-91.

crecy.⁴⁰ The Federalist Papers make clear that the conduct of war, foreign policy, military affairs, and diplomacy were areas which the Framers intended to be controlled by and within the sole purview of the Executive, as evidenced in Federalist Paper 74:

Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms a usual and essential part in the definition of executive authority.⁴¹

This quote is a particularly sharp indication of the way in which the Framers envisioned serious questions of national security to be handled—namely, in the hands of the elected president, who could speak for the entire American people with one voice.⁴²

Although the Senate is vested with the ability to deny its consent to treaties and nominees, the Federalist Papers make it very clear that the Senate's role is only to give or withhold consent and that any attempt by the Senate to control who is nominated by a President for any position is violative of the strictures of the constitution.⁴³ Specifically, Federalist Paper 66 explains that “[t]here will, of course, be no exertion of choice on the part of the senate. They may defeat one choice of the executive and oblige him to make another; but they cannot themselves choose, they can only ratify or reject the choice of the President.”⁴⁴

A persistent theme throughout the Federalist Papers—and the Anti-Federalist Papers as well—is the need for the three branches of government created by the Constitution to be independent of each other to the fullest extent possible.⁴⁵ While conceding that complete branch independence is not possible in the tripartite system, the Federalist Papers make it abundantly clear that there can be no democratic state when one branch is at the mercy of another⁴⁶ or when one

40. *Id.* at 391-92.

41. THE FEDERALIST NO. 74, at 445-48 (Alexander Hamilton).

42. *Id.* at 447-48.

43. See THE FEDERALIST NO. 66, at 339-405 (Alexander Hamilton).

44. *Id.* at 403.

45. See generally THE FEDERALIST PAPERS, *supra* note 36; THE ANTI-FEDERALIST PAPERS, *supra* note 36.

46. THE FEDERALIST NO. 71, at 429-34, (Alexander Hamilton) (“The same rule which teaches the propriety of a partition between the various branches of power teaches us likewise that this partition ought to be so contrived as to render the one independent of the other. To

branch exercises the functions vested in another branch.⁴⁷ Inter-branch dependency involving the legislature as the predominant branch was particularly decried in Federalist Paper 51, which stated that “[w]ere the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal.”⁴⁸

In terms of the powers vested in the legislative branch, the Federalist Papers make clear that this branch is charged with the practical decision of declaring war,⁴⁹ and with raising, providing for, supporting, and maintaining troops of various types.⁵⁰ Interestingly, the legal definition of a “declaration of war” which has emerged is: “A country’s announcement that it is officially engaged in war against another country.”⁵¹ Parenthetically, as will be discussed in Part V below, this definition and the use of the power “to declare war” is problematic to congressional attempts to control modern wars involving fights that stem from ideology and not national identity.⁵² Additionally, the Federalist Papers shed instructive light on the intended ramifications and use of the Necessary and Proper Clause in Article I of the Constitution.⁵³ As stated in Federalist Paper 33, the Necessary and Proper Clause was inserted into the legislative powers article as a method of ensuring that Congress had adequate abilities to carry out its appropriations functions, and not for the purpose of expanding the functions of the Legislature beyond the powers to legislate and appropriate funds.⁵⁴

Thus, it is clear that the Framers meant what they said when they created three individual branches of government and vested them with distinct powers. While there is arguably an overlap of some of these powers, the overlap was in no way intended to allow one branch to subsume the other or to usurp control of that particular area. This is perhaps best demonstrated in the field of war, where Congress has ini-

what purpose separate the executive or the judiciary from the legislative, if both the executive and the judiciary are so constituted as to be at the absolute devotion of the legislative? Such a separation must be nominal and incapable of producing the ends for which it was established.”).

47. THE FEDERALIST NO. 51, at 317-22 (Alexander Hamilton).

48. *Id.* at 318.

49. *See* THE FEDERALIST, *supra* note 41, at 445-448.

50. *See id.*

51. BLACK’S LAW DICTIONARY 415 (7th ed. 1999).

52. *See infra* Part V.B.

53. U.S. CONST. art. I, § 8.

54. THE FEDERALIST NO. 33, at 197-201 (Alexander Hamilton).

tial declaratory power and has overall funding power but does not have and was not intended to have the ability to act in any way to control warfare.⁵⁵ Because the Constitution is the backbone of federal law—especially as it relates to the executive and legislative branches—the terms of the Constitution and the intent of the Framers is extremely important in understanding the boundaries of power between these branches.

PART III – PRESIDENTS, WARS, SECURITY, AND HISTORY

The relative domestic calm of the Cold War and the current war against terrorism in the United States belies the fact that the nation has been involved in many wars and threats to national security since its revolutionary inception.⁵⁶ With these wars came tests and challenges to the President's functions and powers as Commander-in-Chief, which ultimately expanded the notion of the presidential activities necessary to serve this function as the types of wars and security threats evolved over time. The subsections below are intended to briefly chronicle the history of presidential involvement in warfare, national security, foreign affairs, and occurrences which have changed the shape of the balance of power between the executive and legislative branches.

A. *Post-Constitutional Years*

Victory in the Revolutionary War and the ratification of the Constitution did not bring peace to America. With Native American issues on the forefront of many settlers' minds, and sandwiched in between European powers on the North American continent, it was vital that the nation secure itself against threats to its existence and stability. In order to do this, President George Washington retained a cadre of spies and other intelligence operatives to keep him abreast of

55. *See infra* Part V.B.

56. The author's point is that, although one hears about troop casualties and national security measures routinely in news stories, these aspects of war are not ever-present in the daily lives of the average American whereas, for example, during World War II a massive number of American troops left their homes to serve and those left behind were involved in war-related work. Thus, the author's intent is to make the point that war is less palpable to Americans today than at any other time in modern memory other than the Cold War, when war was more clandestine. In this regard, it is the author's position that the American public has become weaned into a relative sense of tranquility, which impacts past memory and the understanding of domestic and international conflicts.

threats and handle them in the manner he saw fit.⁵⁷ President Washington oversaw these operatives himself; the only congressional involvement in their use and function was President Washington's secretive submission of bills for their services to Congress for payment.⁵⁸ Even then, it is reported that Congress made payments to members of President Washington's family in order to avoid divulging the identities of his operatives and risk losing the information which they provided him and the nation.⁵⁹

B. 1800s

During his term as President, Andrew Jackson used the presidential signing statement to indicate his displeasure with a bill presented to him by Congress.⁶⁰ Rather than vetoing the entire bill, President Jackson communicated the issues he had with the legislation through the use of a signing statement, which, while having no binding legal effect, accompanied the bill into law and became part of its legislative history.⁶¹ More important than the contents of and reasons for the use of the signing statement was the public controversy it sparked.⁶²

C. Civil War

The American Civil War posed a unique question for the Executive—whether the war should be handled as an insurrection or a war.⁶³ Regardless of its legal classification, when Confederate troops attacked Fort Sumter, President Abraham Lincoln viewed this as an attack on the Union and promptly took measures to impose a sea

57. See RICHARD A. POSNER, *UNCERTAIN SHIELD: THE U.S. INTELLIGENCE SYSTEM IN THE THROES OF REFORM* 186 (2006). For background on then-General George Washington's use of covert and intelligence operations during the Revolutionary War, see Central Intelligence Agency, *A Look Back . . . George Washington: America's First Military Intelligence Director*, <https://www.cia.gov/news-information/featured-story-archive/george-washington.html> (last visited July 16, 2007).

58. See POSNER, *supra* note 57, at 186.

59. *Id.*

60. T. J. HALSTEAD, *PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS* 5 (Apr. 13, 2007), *available at* <http://www.fas.org/sgp/crs/natsec/RL33667.pdf> (regarding a bill for federal funding for a highway intended to go from Detroit to Chicago; Andrew Jackson believed that Congress could fund the construction of a highway to the Michigan border but not one which extended into Illinois).

61. *See id.*

62. *Id.*

63. *See, e.g.,* *Cushing v. Laird*, 107 U.S. 69 (1883).

blockade and even raise his own network of intelligence operatives.⁶⁴ Further utilizing the powers vested in him as Commander-in Chief, President Lincoln suspended habeas corpus during much of the Civil War.⁶⁵ Congress would later grant President Lincoln wide-ranging powers during the Civil War and ratify President Lincoln's actions in defense of the nation after the attack on Fort Sumter.⁶⁶ Contemporaneous to the Civil War, the Supreme Court held that President Lincoln had the ability to take such measures because of his standing as Commander-in-Chief.⁶⁷ These holdings were bolstered by the well-established military and governmental maxim that defensive action after an attack was not a declaration of war, but rather, a means of protection.⁶⁸

D. World War II

During World War II, President Franklin D. Roosevelt (FDR) established the Office of Strategic Services (OSS) within the Executive Office of the President.⁶⁹ This sometimes shadowy office engaged in espionage and became a key component in wartime strategy and victory.⁷⁰ Congressional interest in and oversight of the OSS and its activities were virtually non-existent during the war, and there were no major challenges to FDR's ability to create an espionage service within the executive branch as part of its wartime function.⁷¹ It is worth noting that, in the wartime security context, FDR became the first president to authorize wiretapping.⁷²

World War II occasioned the landmark case of *Clark v. Allen*, in which the Supreme Court held that the President is solely responsible for American international and foreign affairs policy.⁷³ The *Clark*

64. See *DeArnaud v. U.S.*, 151 U.S. 483 (1894); *Totten v. U.S.*, 92 U.S. 105 (1876); JOHN YOO, *WAR BY OTHER MEANS* 113-4 (2006).

65. See YOO, *supra* note 64, at 265 n.50.

66. *Id.* at 113-4.

67. *Cushing*, 107 U.S. 69.

68. See *Holtzman v. Schlesinger*, 414 U.S. 1316, 1318 (1973); YOO, *supra* note 64, at 11.

69. See generally JOSEPH E. PERSICO, *ROOSEVELT'S SECRET WAR: FDR AND WORLD WAR II ESPIONAGE* (2001) (providing a detailed history of FDR's involvement in the OSS and other spying operations during the course of World War II).

70. *Id.*

71. See ARTHUR B. DARLING, *THE CENTRAL INTELLIGENCE AGENCY: AN INSTRUMENT OF GOVERNMENT TO 1950* (1990).

72. YOO, *supra* note 64, at 72.

73. *Id.* at 26 (citing *Clark v. Allen*, 331 U.S. 503 (1947)).

Court further admonished that, when acting in these areas of policy, the President's decisions were not to be second guessed.⁷⁴

E. Cold War

After World War II ended and the Cold War quickly began, President Harry Truman realized that the OSS operation needed to be continued for the security of the nation; however, he rapidly came to realize that it needed its own funding mechanism.⁷⁵ Thus, President Truman acquiesced to the National Security Act of 1947, which established the Central Intelligence Agency (CIA) as a freestanding entity and endowed it with funding.⁷⁶ Although it is a freestanding agency, the CIA director's role in the overall national security apparatus placed him—and continues to place him—squarely within the dominion of the executive branch's policy plans and oversight.⁷⁷

President Truman also started the modern trend of using presidential signing statements as a method of communicating Executive displeasure at congressional legislation without actually using a veto.⁷⁸ Signing statements had existed for some time; however, they were largely unused since President Jackson's historic use of a presidential signing statement to voice his displeasure with the actions of Congress.⁷⁹ Since the time when President Truman embraced signing statements as a rhetorical and political tool, Presidents of all parties have used signing statements to object to the constitutionality of a variety of bills—including those which sought to circumscribe the powers of the President as granted in the Constitution.⁸⁰

During the Korean Conflict, a steel plant ceased its operations and production of steel due to a labor strike.⁸¹ President Truman became concerned that this cessation in the production of steel—a commodity vital to wartime military production—would harm U.S. interests and the country's ability to adequately fight the war.⁸² Prior

74. *Id.*

75. DARLING, *supra* note 71.

76. *Id.*

77. See CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/about-cia/leadership/index.html> (last visited July 16, 2007) (describing the job of the Director of the CIA).

78. HALSTEAD, *supra* note 60.

79. *See id.*

80. *See generally id.*

81. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 582-83 (1952).

82. *Id.* See also YOO, *supra* note 64, at 183.

to the strike, Congress enacted laws governing labor-related disputes such as those which plagued Youngstown Steel, and debated the possibility of placing such disputes under the jurisdiction of the executive branch. Ultimately, Congress devised a different system for handling labor disputes and did not delegate control to the Executive.⁸³ Concerned over the implications of the Youngstown Steel strike, President Truman interceded and ordered that the steel plant resume its operations, effectively seeking to break the strike so that the plant would produce steel for the war effort.⁸⁴ When sued over this decision, the Executive asserted that it was acting within the scope of the powers delegated to the President as Commander-in-Chief.⁸⁵ The Supreme Court, however, found against President Truman, holding that this was not an area over which he had inherent constitutional authority and that, because Congress debated vesting the Executive with labor-relations powers but ultimately decided not to, there was no statutory basis for President Truman's efforts to reopen Youngstown even in the face of a war-related need.⁸⁶

A trend which emerged in the aftermath of World War II and continues on through the present day is that of the President using Executive Orders⁸⁷ to shape and guide the policies and actions of his administration and those who serve in it. Whether addressed to war-related activities, national security, espionage, foreign policy, domestic policy, or executive branch governance, Executive Orders emerged in the Cold War years as a key method by which the President himself defined his administration and the Executive Office of the President.⁸⁸ This use of Executive Orders is curious, as they are entirely beyond the realm of Congress; however, Congress attempted in recent years to supplant the content of Executive Orders.⁸⁹

In the wake of President John F. Kennedy's assassination, the

83. *Youngstown*, 343 U.S. at 586-87.

84. *Id.* at 583. See also YOO, *supra* note 64, at 183.

85. *Youngstown*, 343 U.S. at 582.

86. *Id.* at 586-89.

87. Executive Orders are tools used by the president to promulgate rules, regulations, and policies of his administration for members of the executive branch. BLACK'S LAW DICTIONARY 591 (7th ed. 1999) (defining an Executive Order as "an order issued by or on behalf of the President, usually intended to direct or instruct the actions of the executive agencies or government officials, or to set policies for the executive branch to follow.").

88. See generally Selected Executive Orders on National Security, <http://www.fas.org/irp/offdocs/eo/index.html> (providing a comprehensive list and description of Executive Orders issued from 1940 to present) (last visited July 16, 2007).

89. See *infra* Part V.B.

Twenty-Fifth Amendment was ratified and enacted in 1965.⁹⁰ This Amendment provided for clear lines of succession in the event of the death or disability of the sitting President or Vice-President.⁹¹ More important for the issue of congressional attempts to reorganize the executive branch, this Amendment granted the President's cabinet the power to vote and declare the President disabled or incapacitated and to vote to reinstate the President when the period of disability or incapacity is deemed to have concluded.⁹² The implications of this Amendment will be discussed in Part V below.

At this time, Congress as a whole—whether controlled by Democrats or Republicans—became an activist branch. Under the guise of the regulatory powers vested in Congress by the Commerce Clause, congressional actions were taken to stop racial discrimination and segregation.⁹³ When challenged, these laws were upheld by the Supreme Court, even in instances where the Court deemed the constitutional basis to be rather shaky.⁹⁴ However, by the late Cold War and Post-Cold War period, Congress was held to have gone too far in its attempts to be an activist body and influence public opinion. Issues such as regulation of guns on school campuses⁹⁵ and liability for sexual assault under the congressionally created Violence Against Women Act⁹⁶ were found by the Supreme Court to have stretched the concept of regulating commerce and its instrumentalities too far. The Acts were overturned, irrespective of the dangers posed by the societal harms which these laws were intended to combat.⁹⁷

During this time, and in particular following the Vietnam era, Congress attempted to assert greater control and guidance over the conduct of national security policy and covert operations.⁹⁸ Congress's attempts included the advent of additional committees and subcommittees tasked with overseeing the intelligence community⁹⁹

90. See U.S. CONST. amend. XXV.

91. *Id.*

92. *Id.*

93. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241 (1964).

94. See *id.*

95. *U.S. v. Lopez*, 514 U.S. 549 (1995).

96. *U.S. v. Morrison*, 529 U.S. 598 (2000).

97. *Morrison*, 529 U.S. 598; *Lopez*, 514 U.S. 549.

98. See FREDERICK M. KAISER, CONGRESSIONAL OVERSIGHT OF INTELLIGENCE: CURRENT STRUCTURE AND ALTERNATIVES (Feb. 15, 2007), available at <http://www.fas.org/sgp/crs/intel/RL32525.pdf>.

99. See *id.* at 2-4.

(without much guidance as to the constitutionality of such a committee structure),¹⁰⁰ the War Powers Resolution,¹⁰¹ legislative attempts to assert congressional control over intelligence community operations through spending,¹⁰² legislative attempts to assert congressional control over covert operations,¹⁰³ and the forced creation of an anti-assassination Executive Order by President Gerald Ford in the face of a mounting congressional threat to enact stricter legislation.¹⁰⁴

In 1973, Congress overrode a presidential veto and enacted the War Powers Resolution, a measure which severely constricted presidential authority as Commander-in-Chief by requiring that numerous steps be taken before a President is allowed to deploy troops of any nature into situations that are not necessarily hostile at the time of deployment.¹⁰⁵ The War Powers Resolution requires that the President meet certain benchmark reporting guidelines for Congress and that he withdraw the troops at issue from the particular theatre or zone of hostilities after sixty days unless Congress authorizes an extended stay in the theatre or zone.¹⁰⁶ At the time of its enactment, President Richard Nixon vehemently objected to the constitutionality of the

100. Despite extensive research, the author has yet to find any constitutional provision or precedent for the creation of standing or special committees which have within their jurisdiction issues and entities not related to the appropriation or legislative areas vested in Congress. It is the author's position that the committees used to oversee the intelligence committee are not legislative in capacity because they seek to invade a space squarely placed in the Executive for no apparent purpose other than embarrassment. The information sought by these committees regarding the general functioning of the intelligence community is available in a general form in the administration's annual appropriations requests. For more on the appropriateness of secrecy in the communications of intelligence-based spending from the executive branch to the legislative branch, see *U.S. v. Richardson*, 418 U.S. 166 (1974).

101. See RICHARD F. GRIMMETT, WAR POWERS RESOLUTION: PRESIDENTIAL COMPLIANCE (June 12, 2007), available at <http://www.fas.org/sgp/crs/natsec/RL33532.pdf>.

102. See 50 U.S.C. § 414 (2006); RICHARD A. BEST JR. AND ELIZABETH B. BAZAN, INTELLIGENCE SPENDING: PUBLIC DISCLOSURE ISSUES (Feb. 15, 2007), available at <http://www.fas.org/sgp/crs/intel/94-261.pdf> (discussing both recent trends in Congressional attitudes towards and actions regarding intelligence community spending requirements and the level of secrecy to be afforded intelligence related spending requests).

103. See 50 U.S.C. § 413a (2006); ALFRED CUMMING, COVERT ACTION: LEGISLATIVE BACKGROUND AND POSSIBLE POLICY QUESTIONS (Nov. 2, 2006), available at <http://www.fas.org/sgp/crs/intel/RL33715.pdf> (providing a history of the many congressional attempts—successful and unsuccessful—to assert control over covert actions).

104. Exec. Order No. 12,333, 46 C.F.R. 59941 (1981). See also YOO, *supra* note 64, at 60.

105. See GRIMMETT, *supra* note 101.

106. *Id.*

War Powers Resolution in his veto message;¹⁰⁷ every President since President Nixon held the same view and enunciated it whenever the War Powers Resolution became an issue.¹⁰⁸ Through the War Powers Resolution, Congress fulfilled its vow of attempting to reign in the powers of the executive branch relative to the conduct of war.¹⁰⁹ Interestingly, no President has sought to challenge the validity of the War Powers Resolution in court.¹¹⁰ Given that the War Powers Resolution was enacted solely under the Necessary and Proper Clause of the Constitution—a clause which the Supreme Court found insufficient to justify the enactment of a statute¹¹¹—a challenge would hardly seem to be improper. On several occasions, Congress was unable to exercise any authority under the War Powers Resolution due to their inability to agree on a course of action.¹¹² There have also been unsuccessful congressional attempts to repeal the War Powers Resolution.¹¹³

Until 1983, Congress acted on the assumption that it had the power to use what was termed a “legislative veto,” in which Congress would unilaterally declare certain points of policy to be law.¹¹⁴ This practice came to a halt in 1983 with the Supreme Court’s decision in *Immigration and Naturalization Service v. Chadha*.¹¹⁵ This case, brought by the Executive through the INS, challenged a legislative veto which overruled the Immigration and Naturalization Service’s and Attorney General’s findings that Respondent Chadha should be deported.¹¹⁶ Citing the constitutional requirement of presentment, the Supreme Court held that legislative vetoes were unconstitutional and required that binding legislation of all types meet both the bicameralism and presentment requirements set forth in the Constitution

107. *Id.*

108. *Id.* It should be noted that even when the War Powers Resolution was used by various presidents to inform Congress of troop deployment or involvement in real or potential hostilities, it has been with the express statement that the War Powers Resolution was not constitutional.

109. *Id.*

110. *See generally id.*

111. *See McCulloch v. Maryland*, 17 U.S. 316 (1819) (establishing the principle that Congress may enact laws under the Necessary and Proper Clause provided that they are in furtherance of another area or power vested in Congress by the Constitution).

112. *See GRIMMETT, supra note 101.*

113. *Id.*

114. *INS v. Chadha*, 462 U.S. 919 (1983).

115. *Id.*

116. *Id.*

in order to be constitutionally and legally legitimate.¹¹⁷

F. *Post-Cold War*

The immediate post-Cold War period was a time of relative relaxation, punctuated by the first Gulf War and several terrorist attacks within and beyond the United States. Support for the first Gulf War was broad-based and Congress was amenable to declaring war and allowing the Executive to conduct the war largely unfettered by congressional attempts at involvement.¹¹⁸ President William Clinton's tenure saw the "peace dividend" idea applied by the Executive and the Legislature to facilitate the downsizing of the United States military.¹¹⁹ Although controversial within largely conservative circles and among members of Congress from districts which were threatened by economic losses as a result, there was not a great deal of tension between the executive and the legislative branches regarding the decision to downsize.¹²⁰ Al-Qaeda's early attempts to damage United States-related targets, such as the U.S.S. Cole, the U.S. Embassy in Nairobi, Kenya, and even the 1993 World Trade Center bombing, attracted media attention but were largely handled within the U.S. intelligence community—and, in the case of the World Trade Center bombing, by the Justice Department and the court system—and there were few congressional attempts to encroach on the powers vested in the Executive in order to reign in this new threat to American stability.

The sense of increased security which pervaded the United States during the initial post-Cold War period was shattered by the Al-Qaeda attacks of September 11, 2001. The September 11th attacks were quickly followed by a broad-based declaration of war against terrorists in general, and Afghanistan in particular.¹²¹ Congress's unofficial declaration of war was open-ended and allowed the Administration great latitude in the pursuit of an atypical war.¹²² The September 11th attacks also resulted in the enactment of the USA PATRIOT Act, granting the executive branch updated powers for the

117. *Id.*

118. See GRIMMETT, *supra* note 101.

119. See generally Christopher S. Yoo, Steven G. Calabresi, and Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945-2004*, 90 IOWA L. REV. 601 (2005).

120. *Id.*

121. YOO, *supra* note 64, at 10.

122. *Id.*

upcoming war on transnational terrorism.¹²³

In the wake of September 11th and the perceived governmental failures which became part of the public understanding of the attacks of that day, Congress has repeatedly attempted to find a way to reform its intelligence oversight structure.¹²⁴ However, no concrete revision system has been proposed or debated, and there are widely differing opinions over any method of reorganizing the congressional oversight committee structure as it relates to the Executive in general and the intelligence community in particular.¹²⁵

Much has been made of the September 11th Commission Report and the legislation which was prompted by it.¹²⁶ As a result, President George W. Bush issued Executive Order 13,228, creating the Office for Homeland Security.¹²⁷ Subsequently Congress created the Department of Homeland Security (DHS), an entity which essentially recreates the Office of Homeland Security, excluding a few key areas.¹²⁸ There is uncertainty over the gray areas created by the enactment of the DHS statute after the Executive Order was promulgated; these gray areas are likely to become future problems.¹²⁹

Periodically, the executive branch has issued a formal National Security Strategy. The goal of this document has historically been to present to the Administration, Congress, the American people and, increasingly, the world, with the nation's plan for domestic and international security in light of the current state of national and world affairs. President G. W. Bush's Administration issued its first National Security Strategy in 2002.¹³⁰ The document—written before congressional involvement in the creation of DHS—plots the Administration's internal reorganization plan, which is explained as necessary in order to better handle the requirements of fighting global terrorism.¹³¹ An essential element of the Administration's reorganization plan was

123. See USA PATRIOT ACT of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

124. See KAISER, *supra* note 98.

125. *Id.*

126. See 9-11 COMMISSION REPORT, NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (2004), available at <http://www.9-11commission.gov/report/index.htm>.

127. Exec. Order No. 13,228, 66 Fed. Reg. 51,812 (Oct. 8, 2001).

128. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

129. Compare Exec. Order No. 13,228 (2001), with Homeland Security Act of 2002, Pub. L. No. 107-296. (2002).

130. THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (Sept. 2002), available at <http://www.whitehouse.gov/nsc/nss/2002/nss.pdf>.

131. *Id.*

the creation of the Office of Homeland Security through Executive Order 13,228.¹³² This National Security Strategy, like its predecessors, is the embodiment of the nation's security strategy as enunciated by the executive branch¹³³

The Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA) was passed by Congress in November, 2004 and subsequently signed by the President.¹³⁴ Several of its provisions, such as the creation of the Director of National Intelligence (DNI), are discussed in greater detail below. In regards to the DNI—which was created as the ultimate buffer between much of the intelligence community and the President but placed outside of the Executive Office of the President¹³⁵—Senator Joseph Lieberman, who was instrumental in the bill's creation and passage, admitted that the DNI is essentially an executive function.¹³⁶ Despite this admission, the IRTPA of 2004 placed the DNI outside of the Executive Office of the President, while at the same time requiring the DNI to act as a buffer between security and intelligence information and the President.¹³⁷ Another important component of IRTPA was the statutory creation of the National Counterterrorism Center (NCTC).¹³⁸ This was a statutory creation as President G. W. Bush had already created such an office in Executive Order 13,354 and provided it with essentially the same powers and responsibilities as IRTPA.¹³⁹

Following Hurricane Katrina and the mountain of blame which fell on the Federal Emergency Management Agency (FEMA) as a result of its disaster response performance, Congress passed and President G. W. Bush signed into law the Post-Katrina Emergency Reform Act of 2006, a bill which sought to reform the perceived problems with FEMA.¹⁴⁰ Several provisions of this attempted reorganization are

132. *Id.*

133. *Id.*

134. *See generally* Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, §1, 118 Stat. 3638 (2004).

135. *Id.*

136. *See* TODD M. MASSE, THE NATIONAL COUNTERTERRORISM CENTER: IMPLEMENTATION CHALLENGES AND ISSUES FOR CONGRESS 8 (Mar. 24, 2005), available at <http://www.fas.org/sgp/crs/intel/RL32816.pdf>

137. *Id.*; Intelligence Reform and Terrorism Prevention Act of 2004, *supra* note 134, at 108-458.

138. Intelligence Reform and Terrorism Prevention Act of 2004, *supra* note 134; MASSE, *supra* note 136.

139. Exec. Order No. 13,354, 3 C.F.R. 214 (2005).

140. Post-Katrina Emergency Management Reform Act of 2006, Pub. L. No 109-295,

particularly challenging to understand from an operational standpoint, such as those provisions which divest much of DHS's direct authority to control and reshape FEMA while still leaving FEMA as part of DHS and under the direction of the DHS Secretary.¹⁴¹ Further, the Post-Katrina Emergency Reform Act imposed specific experience-based qualifications on presidential nominees and appointees to various FEMA positions, including the FEMA Director himself.¹⁴² Despite concerns that these qualification requirements were unconstitutional, President G. W. Bush signed the Post-Katrina Relief Act into law, binding subsequent presidents to these qualification requirements.¹⁴³

In 2003, Congress sought to encourage the Lebanese people in their attempts to free themselves from Syrian involvement in their governmental, political, and security structures.¹⁴⁴ In order to achieve its goal of providing support to the Lebanese, Congress passed the Syrian Accountability and Lebanese Sovereignty Restoration Act, a largely symbolic act which sought to provide the Lebanese with a declaration of American support.¹⁴⁵ Through its content, this act veered into the foreign policy domain assigned to the executive branch—which had already made its own statements on and policies to put political pressure on the Syrian government to cease its quasi-control over Lebanon and to encourage Lebanese independence and sovereignty—and President G. W. Bush used a presidential signing statement to raise his concerns about this congressional overreach.¹⁴⁶

In 2006, the nation became galvanized by congressional outrage at the federal wiretapping “scandal.” Although Congress could ultimately find little legal basis for this outrage, it decided to take action and introduced the National Security Surveillance Act of 2006.¹⁴⁷ Although this legislation was not enacted, this act moved Congress further into the realm of the Executive by attempting to more heavily

120 Stat. 1355 (2006).

141. See KEITH BEA ET AL., FEDERAL EMERGENCY MANAGEMENT POLICY CHANGES AFTER HURRICANE KATRINA: A SUMMARY OF STATUTORY PROVISIONS 7 (Dec. 15, 2006), available at <http://www.fas.org/sgp/crs/homsec/RL33729.pdf>.

142. See 6 U.S.C. § 313 (2006).

143. BEA ET AL., *supra* note 141.

144. Syrian Accountability and Lebanese Sovereignty Restoration Act, Pub. L. No. 108-175 117 Stat. 2482 (2003).

145. *Id.*

146. HALSTEAD, *supra* note 60, at 152.

147. S. 2453, 109th Cong. (2006).

regulate wiretapping, a practice which was recognized as within the prerogative of the executive branch since FDR began the practice during World War II.¹⁴⁸

2006 also saw the issuance of a new National Security Strategy by the executive branch.¹⁴⁹ The new National Security Strategy was deemed necessary by the Administration after the wars in Afghanistan and Iraq had progressed beyond the initiatory phases and had moved into the secondary phases of democratization.¹⁵⁰ This document continued to speak as the one voice for American security, military, and diplomatic policy around the world.¹⁵¹ Of particular importance to this Article are the many proposals to reorient the Department of State and to reinvigorate the activities of USAID made in the 2006 National Security Strategy.¹⁵² In addition to the new National Security Strategy, in 2006 G. W. Bush's Administration released a report entitled "9/11 Five Years Later."¹⁵³ This document discussed the many steps taken by the Administration to counteract the conditions which gave rise to the September 11th attacks and demonstrated that agencies within and without the executive office of the President worked together to implement the President's National Security Strategy and policies; these are not areas in which Congress plays an extended role constitutionally or practically.¹⁵⁴

The Fiscal Year 2007 Homeland Security Appropriations Act saw the culmination of five years of executive branch efforts to provide the DHS Secretary with the ability to regulate security procedures at certain designated chemical plants and facilities in the United States.¹⁵⁵ Public concern over the regulation and safety of such facilities, especially in light of reports that terrorists were targeting "soft targets" within the United States, prompted these requests.¹⁵⁶ However, the authorizing legislation is only valid until 2009 and there ap-

148. See YOO, *supra* note 64, at 72.

149. The National Security Strategy of the United States of America, *supra* note 130.

150. *Id.*

151. See *id.*

152. *Id.*

153. 9-11 FIVE YEARS LATER: SUCCESSES AND CHALLENGES (September 2006), *available at* <http://www.whitehouse.gov/nsc/waronterror/2006/waronterror0906.pdf>.

154. *Id.*

155. Department of Homeland Security Appropriations Act, 2007, Pub. L. No 109-295, 120 Stat. 1355 (2006); DIANA A. SHEA & TODD B. TATELMAN, CHEMICAL FACILITY SECURITY: REGULATION AND ISSUES FOR CONGRESS (Mar. 26, 2007), *available at* <http://www.fas.org/sgp/crs/homsec/RL33847.pdf>.

156. SHEA & TATELMAN, *supra* note 155.

pears to be a sense among some in Congress that the powers granted to DHS under the FY2007 Appropriations Act need to be circumscribed.¹⁵⁷

The enactment of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act of 2007¹⁵⁸ saw Congress reaching into executive control over the planning and implementation of the Iraq War to require that the administration provide Congress with "benchmark" reports and information on the progress in Iraq in order for Congress to evaluate the continuation of the war.¹⁵⁹

Currently, the Defense Department, in conjunction with the executive branch—specifically, the Department of State and various associated security and aid operations—is proposing to reorient the way in which U.S. military, intelligence, and diplomatic/civilian actions in Africa are administered and organized.¹⁶⁰ The Defense Department explains that this reorganization is necessary given the nature of issues on the African continent and their impact on U.S. domestic and foreign policy.¹⁶¹ The AFRICOM plan intends to merge the military, intelligence, diplomatic and civilian aid functions—namely USAID—into multiple units dispersed throughout Africa and administered under a centralized African command.¹⁶² The goal of this system is to replace the United States' German-based command structure, which is currently used by the military, with a command structure which focuses solely on African issues and to create a mobile and swift-moving U.S.-based response team on the ground in Africa, which would allow U.S. officials and offices to work in a coordinated fashion during times of emergency or other necessity.¹⁶³ The AFRICOM plan is a prime example of the President G. W. Bush Administration's intent to reorient various aspects of the State Department—especially USAID—as part of the National Security Strategy.¹⁶⁴ However, due

157. *See generally id.*

158. Iraq Accountability Appropriations Act of 2007, Pub. L. No.110-28, 121 Stat. 112 (2007).

159. *Id.* *See also* INITIAL BENCHMARK REPORT (July 12, 2007), *available at* <http://www.whitehouse.gov/nsc/iraq/2007/FinalBenchmarkReport.pdf>.

160. *See* LAUREN PLOCH, AFRICA COMMAND: U.S. STRATEGIC INTERESTS AND THE ROLE OF THE U.S. MILITARY IN AFRICA (May 16, 2007), *available at* <http://www.fas.org/sgp/crs/natsec/RL34003.pdf> (describing the AFRICOM proposal).

161. *Id.*

162. *Id.*

163. *Id.*

164. *See* The National Security Strategy of the United States of America, *supra* note

to the multitude of congressional committees having jurisdiction over elements of AFRICOM and the increasing incursion of congressional committees into areas which were once delegated to the executive branch, AFRICOM remains very much a plan as of the time of writing.

At the time of publication of this article, the House Foreign Affairs Committee passed legislation condemning the deaths of Armenians at the hands of the Ottoman Empire nearly a century ago and declaring these deaths to constitute genocide.¹⁶⁵ In so doing, the Foreign Affairs Committee pushed this legislation forward for consideration and eventual voting by the House of Representatives.¹⁶⁶ Despite vehement objections from the Executive and potential damage to the relationship between the United States and Turkey – a key American ally in the Middle East, which is currently facing an internal struggle over the maintenance of a secular state – the House committee leadership has refused to withdraw this legislation.¹⁶⁷ After the Turkish government withdrew diplomatic personnel from the United States in protest of the actions of the House Foreign Affairs Committee, the Executive felt it necessary to send State Department officials to meet with representatives of the Turkish government and attempt to indicate that the actions of the House do not represent the policy of the Executive or the United States *per se*.¹⁶⁸ Thus, the House has critically damaged the ability of the Executive to speak as the unified voice of the United States and has created a duality in American foreign policy which is currently threatening a key component of the Executive's established foreign policy in the Middle Eastern region, while also implicating the obligations of the United States to a NATO member.

PART IV – NATIONAL SECURITY PROTOCOLS, STATUTORY PROVISIONS, AND CONSIDERATIONS

In addition to the provisions of the Constitution, the powers of the President and the legislative branch in relation to national security issues and military powers are codified at various points throughout

130, at 37 (2006).

¹⁶⁵ See US Bill on Armenia Moves Forward (Oct. 11, 2007), <http://news.bbc.co.uk/2/hi/americas/7038762.stm>.

¹⁶⁶ *Id.*

¹⁶⁷ See *id.*

¹⁶⁸ See US Envoy Seeks to Calm Turkey Row (Oct. 13, 2007), <http://news.bbc.co.uk/2/hi/europe/7043170.stm>.

the United States Code—the codification body for the laws of the United States. Statutes which are particularly important to the executive branch reorganization topic of this Article are briefly discussed below. Also discussed in this Part are Executive Orders, Directives, and other documents, the issue of the classification of national security information and other information possessed by the government, and the national security structure.

A. *Statutory Provisions*

1. *The President*

Of particular interest to the question of the appropriate roles of the legislative branch and the executive branch in reorganization of the executive branch is 3 U.S.C. § 301, which expressly allows the President to delegate to agency and department heads within the executive branch “any function which is vested in the President by law,” or “any function which such officer is required or authorized by law to perform only with or subject to the approval, ratification, or other action of the President”¹⁶⁹

2. *The Legislature*

The ability of each house of Congress to have a functioning committee structure is codified in statute.¹⁷⁰ Further, each house has its own rules which relate to, in relevant part, the organizational structure of committees and the creation of new committees.¹⁷¹ However, neither these statutes nor these rules specify the portions of the constitution which justify the creation of the plethora of committees and subcommittees used by the House and Senate today.¹⁷² Nothing in statute or rule creates or discusses any familiarity or experience requirement for the areas over which a committee or subcommittee has jurisdiction.¹⁷³ Further, there is no requirement that members of a committee or subcommittee employ staffers who are versant in the particular areas of expertise necessary to evaluate the issues attendant in the committee or subcommittee’s jurisdiction, be it agriculture or

169. 3 U.S.C. § 301 (2006).

170. 2 U.S.C. § 190d (2006).

171. See H. R. RES. 6, 110th Cong. (2007) (codifying the House rules); Standing Rules of the Senate, R. XXV (2007), available at <http://rules.senate.gov/senaterules/rule25.php>.

172. See *id.*

173. See *id.* See also 2 U.S.C. § 190-99 (2006).

intelligence.¹⁷⁴

Additionally, although there are statutes giving some weight to the power of a congressional subpoena, there is no enforcement mechanism for committees or subcommittees other than appropriations-based retaliation or attempts at introducing legislation aimed at the topic of a committee hearing.¹⁷⁵

3. *Homeland Security*

As described above, the Office of Homeland Security came into existence in 2002 pursuant to Executive Order 13,228.¹⁷⁶ However, Congress created the Department of Homeland Security—essentially a duplicate of the Office of Homeland Security—by statute in late 2002 as part of the Homeland Security Act.¹⁷⁷ Under the Homeland Security Act, DHS was placed within the Executive Office of the President¹⁷⁸ and its Secretary has broad powers over the designation of its staff members.¹⁷⁹ The Secretary of DHS promulgates the rules for information sharing within the many agencies which are part of the DHS.¹⁸⁰ In certain instances, such as trade regulations which will impact international trade, the Secretary of DHS is required to notify several congressional committees prior to taking any action or implementing a regulation.¹⁸¹ As referenced above, the Post-Katrina Emergency Reform Act allowed Congress to prescribe qualification requirements for the presidential nominee to head FEMA, along with several key FEMA posts which are presidential appointments.¹⁸²

As previously discussed, in 2001, President G. W. Bush created the Homeland Security Council—similar in many respects to the National Security Council—with Homeland Security Presidential Direc-

174. 2 U.S.C. § 190-99 (2006).

175. *Id.*

176. Exec. Order No. 13,228, 66 Fed. Reg. 51812 (Oct. 10, 2001).

177. Homeland Security Act of 2002, Pub. L. No 107-296, 116 Stat. 2135 (2002).

178. 6 U.S.C. § 111 (2006).

179. 6 U.S.C. § 115 (2006). *See also* 6 U.S.C. § 121 (2006) (establishing the Directorate for Information and Analysis—an area which was of specific concern to the President, Congress, and the September 11th Commission—within the DHS and allowing the President to appoint its leadership).

180. 6 U.S.C. § 141 (2006).

181. *See e.g.*, 6 U.S.C. § 217 (2006). This is one of many provisions requiring congressional notification of certain actions and that certain segments of DHS frequently report their actions to designated congressional committees.

182. 6 U.S.C. § 313 (2006).

tive 1.¹⁸³ Again, Congress duplicated the terms of this Executive Order by enacting legislation providing for the creation of the Homeland Security Council within the Executive Office of the President.¹⁸⁴

4. *U.S. Military Code*

In his role as Commander-in-Chief, the President is granted extensive authority to use and deploy the military in civil disaster situations once certain statutory requirements have been met.¹⁸⁵ Although this ability is somewhat circumscribed due to the inherent risk of implicating the anti-posse comitatus laws,¹⁸⁶ it should be noted that the 2007 Defense Appropriations Bill did contain a clause providing that the President can send in federal troops to certain state disaster and emergency situations to enforce laws and restore order even without a request from a state or local government.¹⁸⁷

5. *War and National Defense*

As part of his role as Commander-in-Chief, the President has been given the power to remove from the United States citizens of a nation with which the United States is at war under the appropriate circumstances.¹⁸⁸ The President is given plenary power over the National Defense Stockpile; however, Congress has placed specific restrictions on the President's decisions regarding the use of the National Defense Stockpile.¹⁸⁹ In times of national emergency, the President may regulate the anchorage and movement of maritime vessels;¹⁹⁰ in times of insurrection, the President may suspend commercial intercourse with the particular states in insurrection.¹⁹¹

183. Press Release, Homeland Security Presidential Directive- 1 (Oct. 29, 2001), <http://www.whitehouse.gov/news/releases/2001/10/20011030-1.html>.

184. 6 U.S.C. § 491 (2006).

185. See U.S. CONST. art. II, § 2.

186. *Posse comitatus* refers to the use of military forces to serve as civilian police. BLACK'S LAW DICTIONARY 1183 (7th ed. 1999). Its prohibition is aimed at preventing the military's access to control over civilian law enforcement mechanisms. See *id.*

187. Department of Defense Appropriations Act of 2007, Pub. L. No. 109-289, 120 Stat. 1257 (2006).

188. 50 U.S.C. § 21 (2006).

189. 50 U.S.C. § 98 (2006).

190. 50 U.S.C. § 191 (2006).

191. 50 U.S.C. § 205 (2006). It should be noted that this statute essentially codified powers which Congress and the Supreme Court recognized as being essential to the functioning of the President as Commander-in-Chief during the Civil War. See *generally* Cushing v. Laird, 107 U.S. 69 (1883).

In terms of intelligence activities, the applicable statutes demonstrate the extent to which recent congressional activities have attempted to undermine presidential control of the intelligence community and its functioning. Members of the intelligence community are required to operate within a tightened system of funding for overt and covert operations¹⁹²—a system in which it was made more difficult to transfer funds during the current war under the provisions of the IRTPA of 2004.¹⁹³

Several miscellaneous but very important provisions for the purposes of this Article are scattered throughout title 50 of the U.S. Code. One places limits and congressional oversight requirements on presidential declarations of national emergency and the continuation of such declarations.¹⁹⁴ It also creates accountability and reporting requirements for the President in certain circumstances.¹⁹⁵ Another provision provides the President with certain authority under the International Emergency Economic Powers subsection of this title.¹⁹⁶ Yet another requires that specific congressional reporting requirements be followed in regards to international embargoes against governments in armed conflict with the United States.¹⁹⁷

B. Executive Documents, Orders, and Directives

Starting with FDR, modern American Presidents have used a system of issuing national security policies, sometimes called directives, to members of the intelligence community and the executive branch. These documents are often confidential and provide authorizations and guidance to the intelligence community and those other members of the executive branch whose functions are implicated by the particular topic of the document.¹⁹⁸ Many times, such documents

192. 50 U.S.C. §§ 413, 413a (providing for restrictions on and required congressional involvement in covert operations and actions); 50 U.S.C. § 414 (providing limitations on intelligence funding and providing the level of information which congressional committees must be provided in order to consider intelligence funding).

193. Intelligence Reform and Terrorism Prevention Act of 2004, *supra* note 34, at § 6303 (2004).

194. 50 U.S.C. § 1541 (2006).

195. *Id.*

196. 50 U.S.C. § 1702 (2006). For a discussion of the Supreme Court's construction of the scope of the President's powers under the IEEPA, see *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

197. 50 U.S.C. § 1707 (2006).

198. See Presidential Directives and Executive Orders, <http://www.fas.org/irp/offdocs/direct.htm> (last visited Sept. 9, 2007).

address pressing or emerging international threats to the U.S., its allies, and its interests.¹⁹⁹ There are several unifying themes throughout the history of these documents and the diverse Administrations which have issued them. Unilaterally, these documents were used for the creation of committees and subgroups within the NSA to handle specific issues or were vested with specific jurisdiction.²⁰⁰ These entities were created entirely at the will of the sitting President and their composition was also at the sitting President's will.²⁰¹ These entities helped Presidents craft national security strategies on a small and large scale.²⁰² Additionally, these documents were typically the home of covert action directions and authorizations.²⁰³

Executive Orders are used by Presidents to promulgate rules and regulations which are binding on members of the executive branch.²⁰⁴ These Orders have been used in many realms of policy formation and implementation,²⁰⁵ however, a few deserve attention for the purposes of this paper. In Executive Order 11,051, President John F. Kennedy created the Director of Emergency Planning within the executive branch.²⁰⁶ This order is notable because, decades before September 11th, President Kennedy created a less onerous version of the Director of the Office of Homeland Security which President G. W. Bush created in 2002.²⁰⁷ Unlike his successor, President Kennedy's order was not met with a subsequent attempt at reorganization by Congress. Additionally, and without congressional incident, President Clinton established the President's Foreign Intelligence Advisory Board in Executive Order 12,863.²⁰⁸

National Security Presidential Directive 51/Homeland Security Presidential Directive 20, issued under President G. W. Bush's joint system of classifying national security and homeland security presidential directives together, establishes the requirements for executive

199. *See id.*

200. *See id.*

201. *See id.*

202. *See id.*

203. *See id.*

204. *See* Selected Executive Orders on National Security, *supra* note 88.

205. *See id.*

206. Exec. Order No. 11,051, *available at* <http://www.fas.org/irp/offdocs/eo/eo11051.htm>.

207. *See* Exec. Order No. 13,228, *available at* <http://www.fas.org/irp/offdocs/eo/eo-13228.htm>.

208. Exec. Order No. 12,863, *available at* <http://www.fas.org/irp/offdocs/eo12863.htm>.

branch continuity of control.²⁰⁹ Since September 11, 2001, continuity of control planning—culminating in the G. W. Bush Administration's National Continuity Policy—has been a key area of concern and importance.²¹⁰ These directives require that entities within the executive branch establish continuity protocols and establish a liaison between the Executive and the legislative and judicial branches for the purpose of ensuring that continuity is provided at all levels of government.²¹¹ These directives make clear that the covered agencies are under the exclusive jurisdiction of the Executive in terms of the formulation and implementation of continuity planning and that the Executive is not interested in the continuity plans of the other branches.²¹²

Another area over which the Executive exercises primary control is the national threat level system.²¹³ Adopted in the wake of September 11th, this system is likely familiar to readers, especially those who have traveled in commercial airplanes since the attacks. This system uses color-coding to inform executive branch and DHS-related agencies of the level of known and/or expected threats to the nation.²¹⁴ It also acts as an index for individuals and corporations, and changes to the threat level have affected everything from family holiday plans to stock exchange rates.²¹⁵

C. The Classification System

Prior to FDR's Executive Order relating to the regulation of state secrets made during World War II, control over state secrets—especially secrets relating to national security—was vested in the military.²¹⁶ A nascent non-military attempt to regulate the flow of this

209. Press Release, National Security and Homeland Security Presidential Directive (May 9, 2007), <http://www.whitehouse.gov/news/releases/2007/05/20070509-12.html>.

210. See, e.g., R. ERIC PETERSEN, NATIONAL CONTINUITY POLICY: A BRIEF OVERVIEW (June 8, 2007), available at <http://www.fas.org/sgp/crs/secretary/RS22674.pdf>.

211. National Security and Homeland Security Presidential Directive, *supra* note 205.

212. *Id.*

213. See Press Release, President Welcomes Employees to Department of Homeland Security (Feb. 28, 2003), <http://www.whitehouse.gov/news/releases/2003/02/20030228-2.html>; Press Release, Homeland Security Presidential Directive-3 (Mar. 12, 2002), <http://www.whitehouse.gov/news/releases/2002/03/20020312-5.html>

214. See Homeland Presidential Security Directive-3, *supra* note 210, at ¶ 3. See also Homeland Security Advisory System, http://www.dhs.gov/xinfo/share/programs/Copy_of_press_release_0046.shtm (last visited July 16, 2007).

215. See *id.*

216. See HAROLD C. RELYEA, SECURITY CLASSIFIED AND CONTROLLED INFORMATION: HISTORY, STATUS, AND EMERGING MANAGEMENT ISSUES 2 (Mar. 8, 2007), available at

type of information was made during World War I; however this attempt did not come to fruition as hoped.²¹⁷ At the end of World War II, President Truman asserted that classification control was vested squarely in the executive branch; this argument was accepted and the Executive began to set classification policy and enact requirements.²¹⁸

Since Truman's assertion, every successor Administration has accepted that the executive branch has ultimate classification control by virtue of the Constitution and has shaped classification policy accordingly.²¹⁹ Various departments and agencies have their own protocols for handling classification but, ultimately, control over classification and its implementation is an executive function.²²⁰ There have been repeated attempts by Congress to usurp presidential control over the classification system—most notably during the course of the legislative history prior to the National Intelligence Reform Act of 2004—but these attempts have systematically failed.²²¹ Within the legislative branch, it should be noted that each house has its own protocol for securing classified information received by the plethora of committees which require or request it.²²² The House has stringent guidelines for handling such information, while the Senate has very few protocols and its rules permit members and staffers to disclose information which the Administration has chosen to classify.²²³

D. National Security Structure

The latest attempt to reshape the United States' national security structure was the IRTRA of 2004, which replicated many of the provisions contained in various Executive Orders and created the position of Director of National Intelligence (DNI) as a separate entity, reporting to the President and receiving reports and information from

<http://www.fas.org/sgp/crs/secretary/RL33494.pdf>.

217. *Id.*

218. *Id.*

219. *Id.* at 2-5. See *Dep't of the Navy v. Egan*, 484 U.S. 518 (1988) (validating the idea of Executive primacy in the field of classifying information). See also NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE U.S. (9-11 COMMISSION), THE 9/11 COMMISSION REPORT 387 (July 22, 2004), available at <http://www.gpoaccess.gov/911/pdf/fullreport.pdf>. (recommending that security clearance procedures and protocols be an administrative/executive function).

220. See RELYEA, *supra* note 212, at 2-5.

221. See S. REP. No. 108-359, at 4-16 (2004).

222. See KAISER, *supra* note 98, at 4.

223. *Id.*

other members of the intelligence community.²²⁴ The national security structure itself includes military information from the Department of Defense—which is separate from the overall National Security Agency apparatus—and a host of agencies, such as DHS, FBI, and CIA.²²⁵ DHS comprises myriad agencies, ranging from the Coast Guard to FEMA.²²⁶ Unlike the National Security Agency, the newly created position of the DNI is a presidential appointee but his office is not located within the Executive Office of the President.²²⁷

PART V – THE EXECUTIVE, CONGRESS, AND THE EXECUTIVE BRANCH

Beyond its general historical and legal interest, the above information was presented in order to create a foundation and context for the principle arguments of this Article. The crux of this Article’s argument is that only the Executive has the constitutional and operational power to reorganize the executive branch, especially in regards to issues of national security, military operations, and foreign affairs, and that congressional attempts to do so are legally void. This argument is based on two underlying principles: (1) the provisions of the Constitution itself—bolstered by legislative intent from the Framers, jurisprudential findings, and historical constructs; and (2) the recently emerging pattern of congressional usurpation of executive powers and responsibilities on a massive scale across all policy areas. For these reasons, there is both a legal and practical need for control over the executive branch, especially in relation to any potential reorganization generally—and any reorganization which would affect the intelligence community and national security policy in particular—to be vested solely and squarely in the Executive.

A. *The Constitution and Reorganization*

Outside of the Bill of Rights provisions, arguably the most recognizable creation of the Constitution and its Framers is the three branch system of government. It was with this system that the Fram-

224. Intelligence Reform and Terrorism Prevention Act of 2004, *supra* note 134.

225. See RICHARD A. POSNER, UNCERTAIN SHIELD: THE U.S. INTELLIGENCE SYSTEM IN THE THROES OF REFORM 14–15 (2006) (providing a detailed map of the entities which are part of the security structure in the United States).

226. *Id.*

227. Intelligence Reform and Terrorism Prevention Act of 2004, *supra* note 134, at § 1011.

ers intended to defeat the possibility of tyranny within America and ensure a stable democracy for generations of Americans.²²⁸ The Framers carefully and clearly vested substantive powers and responsibilities in each branch, mindful of the need to weight each branch separately to preserve governmental and societal liberty.²²⁹

For the purposes of this Article, it is important to remember that the Framers vested the executive branch with the Commander-in-Chief function,²³⁰ the overall requirement to serve as the Chief Executive of the nation,²³¹ the ability to negotiate treaties and thereby fashion American foreign policy and conduct foreign relations,²³² the ability to nominate superior officers—subject to the advice and consent of the Senate—and to appoint inferior officers,²³³ the duty to receive ambassadors,²³⁴ and the duty to take care that the laws be faithfully executed.²³⁵ Many of these powers and responsibilities were previously vested in the Continental Congress generally and it is important to note and understand that the Framers made a conscientious decision to take these powers away from the legislative branch and vest them in the newly created executive branch. It is also important to note that the executive branch was explicitly modeled on and incorporated provisions of state constitutions, which had always provided for an executive branch which was imbued with many of these powers and which functioned apart from the various state legislatures.²³⁶

Likewise, the Framers vested the legislative branch with the power and responsibility to enact legislation,²³⁷ make monetary appropriations,²³⁸ issue a declaration of war,²³⁹ provide, raise, support, and maintain the military and militias,²⁴⁰ make laws necessary and

228. See THE FEDERALIST NO. 47 (James Madison).

229. *Id.*

230. U.S. CONST. art. II, § 2.

231. *Id.* at § 1.

232. *Id.* at § 2.

233. *Id.*

234. *Id.* at § 3.

235. *Id.*

236. See THE FEDERALIST NO. 39 (James Madison) (explaining that the powers, responsibilities, and limits placed on the executive branch in the Constitution were derived from various state constitutional provisions governing state executives); Harrington, *supra* note 18, at 8.

237. U.S. CONST. art. I, § 1.

238. *Id.* at § 9.

239. *Id.* at § 8.

240. *Id.*

proper to carrying out its functions,²⁴¹ and for the Senate to give its advice and consent on presidential nominees and treaties.²⁴² These powers were retained from the powers possessed by the Continental Congress and were similar to those powers vested in the majority of state legislatures through state constitutional provisions.

Beyond the face of the Constitution, the Framers provided illuminating statements regarding their intent in creating each branch of government throughout the Federalist Papers. In these publications, the Framers demonstrated time and again that their main aim in creating the Constitution—and the tripartite system of federal government which it installed in America—was the protection of the safety of the American people from international threats, rebellions, and the instability and duplicity which emerged under the loose federation memorialized in the Articles of Confederation. Overall, the Framers were adamant that the use of a tripartite system was intended to vest each branch with its own independence and that no one branch should attempt to perform the functions of another branch because this could lead to the tyranny of one branch at the expense of the other branches and the system of liberty created in the constitution.²⁴³

In terms of the executive branch, the Federalist Papers make it clear that the Executive was given primacy in the area of negotiating treaties because of the secrecy and intelligence which is necessary in order for treaties to be properly negotiated.²⁴⁴ It was also expressly stated that the Senate's power in the confirmation process was to issue advice and consent to the President—if deemed appropriate—and not to direct the President's nominee.²⁴⁵ To the Framers, the executive branch was the appropriate branch for the conduct of war and the handling of military affairs, of diplomacy, and of foreign affairs because of its inherently and uniquely unitary quality, which devolved to one person who spoke for and represented the nation and its people.²⁴⁶ Thus, it is clear that both the Constitution and its Framers had a particular role in mind for the Executive and did not intend for any other branch to attend to those functions.

In terms of the legislative branch, the Federalist Papers go to

241. *Id.*

242. U.S. CONST. art. II, § 2.

243. *See supra* Part II.C.

244. *See supra* Part II.C.

245. *See supra* Part II.C.

246. *See supra* Part II.C.

great lengths to explain that the system used to elect the members of the House and Senate is at once representative and insular to popular revolts;²⁴⁷ that the Congress is intended to have control of the purse, including for military expenditures;²⁴⁸; and that the Necessary and Proper Clause was meant to be a corollary to the congressional appropriations function and nothing more.²⁴⁹ Therefore, it is clear that the Framers vested the legislative branch with its own distinct set of powers and responsibilities, but that interfering in the internal structure and functioning of other branches—or the usurpation of any function vested in another branch—was not one of these powers or responsibilities.

Within the realm of national security, the Executive has historically been afforded great latitude in the conduct of warfare, national security, and intelligence operations until the relatively modern era, when congressional understanding of the Executive's function began to shift.²⁵⁰ Presidents Washington to Lincoln to FDR were actively involved in the use of intelligence operations with little more than a congressional request for a bill or reaffirmation of support for the actions taken by the President in his role as Commander-in-Chief.²⁵¹ Although the nomination process for various cabinet members has historically taken sometimes turbulent twists,²⁵² once in place in the executive branch, congressional interference in the functioning of that branch was typically minimal.²⁵³ Issues such as the classification of intelligence information and state secrets were initially issues for the military alone; when this changed, such issues were vested in the Executive, where all manner of authorities agree that they should constitutionally reside.²⁵⁴

Post-World War II Presidents have uniformly and without challenge used Executive Orders and a variety of directives to shape the

247. *See generally* THE FEDERALIST NOS. 65-66 (Alexander Hamilton), NO. 64 (John Jay), NOS. 52-53, 55-57, 62-63 (James Madison).

248. *See supra* Part II.C.

249. *See supra* Part II.C.

250. *See supra* Part III.

251. *See supra* Parts III.A, C-D.

252. For example, President Andrew Jackson fought legendary battles with Congress, including one over his nomination for the position of Minister to England. *See* Biography of Andrew Jackson, <http://www.whitehouse.gov/history/presidents/aj7.html> (last visited Sept. 9, 2007).

253. *See supra* Part III.A-D.

254. *See supra* Part III.A-D.

nation's security and intelligence policy.²⁵⁵ Throughout history, the President's ability to act as the sole organ of American foreign policy and diplomacy has been largely unchallenged, although, as discussed below, this trend has slowly and dangerously become subject to slight erosion and has been threatened with further erosion during the nation's current fight against terrorism.

Finally, the enactment of the Twenty-Fifth Amendment to the Constitution elevated the role of executive branch cabinet members from their previous positions as overseers of their particular administrative domains and oracles to and of the President in their specific fields of agency and policy control. Under the provisions of the Twenty-Fifth Amendment, these cabinet members are also arbiters of the President's incapacity and/or disability for the purpose of certifying whether a President should be temporarily removed from office in favor of the Vice President or the next in the established line of succession.²⁵⁶

Taken together, the Constitution and its several forms of interpretation set the boundaries of legislative branch involvement in the organization or reorganization of the executive branch at appropriating the funds necessary for the administration and proper functioning of the executive branch²⁵⁷ and providing advice and consent for nominations and treaties as required in the Constitution.²⁵⁸ This boundary reflects the provisions of the Constitution, its Framers' intent for the functions of each branch of government, and the actions of subsequent Congresses, Presidents, and Supreme Court Terms in regards to the appropriate roles of the executive and legislative branches. It is reinforced by the provisions of the Twenty-Fifth Amendment to the Constitution because excessive Legislative involvement in and oversight of the structuring of the executive branch raises the risk that a congressional body could shape the executive branch in a way that it would be more favorably disposed to declaring the President incapacitated or disabled and removing him from office. Lest this seem like a preview of the next season of the hit television show "24," the author would remind readers that, with confirmations becoming in-

255. *See supra* Part III.E-F.

256. *See* U.S. CONST. amend. XXV.

257. By appropriating, the author means both the provision of economic resources and, where necessary, the creation and funding of additional governmental agencies at the Executive's request.

258. *See supra* Part II.C.

creasingly contentious,²⁵⁹ several administrations have decided to chose “consensus” candidates who are deemed in favor with and favorable to the Senate for cabinet positions. Given this trend, and the congressional trend of attempting to ratchet up political rhetoric by threatening to call a host of executive officials before congressional committees at the cost of their reputations (even for imagined infractions) and micromanaging the budgets of executive agencies, concern over the relationship between the Twenty-Fifth Amendment and allowing the legislative branch more control over the structure and reorganization of the executive branch is indeed realistic.

B. Patterns of Congressional Usurpation and Reorganization

As discussed above, the years since the end of World War II have seen a dramatic rise in the incidents of congressional involvement and attempted involvement in areas which were once recognized as the sole province of the Executive.²⁶⁰ This represents more than a benign and vigorous attempt to do the duties vested in the legislative branch by the Constitution; rather, it represents a bipartisan attempt to enlarge congressional powers at the expense of the executive branch, particularly in the realm of national security, the military, and foreign policy.

After World War II, Truman’s decision to retain an intelligence operation similar to the OSS caused him to seek funding for the CIA, which in turn resulted in the National Security Act of 1947 and the creation of the CIA as a separate agency.²⁶¹ From this point on, Congress became increasingly interested in the activities of the American intelligence community; this interest frequently went beyond predictable appropriations reasons.²⁶² Requests for information on CIA and other intelligence community member activities during the 1960s and 1970s were made by various congressional committees.²⁶³ When

259. Two prominent examples are the confirmations of now-Justice Samuel Alito and now-Chief Justice John Roberts to the United States Supreme Court. See *Bush Urges Quick Confirmation of Alito* (Jan. 14, 2006), <http://www.cnn.com/2006/POLITICS/01/14/bush.radio/index.html>; *I Come with ‘No Agenda,’ Roberts Tells Hearing* (Sept. 13, 2005), <http://www.cnn.com/2005/POLITICS/09/12/roberts.hearings/index.html>.

260. See *supra* Part III.E-F.

261. See *supra* Part III.E.

262. See generally BARRY M. BLECHMAN, *THE POLITICS OF NATIONAL SECURITY: CONGRESS AND U.S. DEFENSE POLICY* (1992) (examining the interaction between the federal executive and legislative branches on topics of defense policy, military budget, covert operations, and war powers).

263. See *id.* at chs. 1-2.

these requests were complied with, predictably, they revealed information which was startling and possibly repugnant to some in the public, the government, and the press, and resulted in the creation of an extensive notification protocol imposed by Congress on the President and members of the intelligence community whenever covert action was to be used.²⁶⁴ These actions, though compelling sound bites for television news show appearances and constituent newsletters, directly interfered with the powers of the Executive to control national security, as vested in him by the constitutional Commander-in-Chief provision and recognized implicitly and explicitly for centuries.

Intelligence operations have come under increasingly intense scrutiny from various members of Congress and there has been a chorus of requests for at least the basic elements of the intelligence community's budget to be declassified and released to the public despite explanations from those in the Executive and intelligence community which highlight the danger of doing so and the necessity of maintaining the current classified system.²⁶⁵ At the same time, Congress imposed strict funding and budgetary restrictions on the intelligence community as a whole through such acts as the IRTPA, which requires that the DNI inform Congress prior to shifting money from one operation to another even after an internal, executive finding of necessity has already been made.²⁶⁶

Congress has periodically attempted to reorganize the Executive and its constituent parts.²⁶⁷ It achieved part of this goal in 2002, with the creation of DHS, and in 2004, with the creation of the DNI and its attempt to streamline the intelligence community overall.²⁶⁸ This Article has already shown that the majority of the provisions in both of these acts were already provided for by Executive Orders issued by the President and, further, that these acts were enacted despite evidence that the best way to handle the perceived problems with the American intelligence community prior to September 11th was through purely executive action. It is important to note that, in addition to the legislative branch encroachment upon the executive branch and its functions, these acts further usurped executive powers and

264. *See id.*

265. *See generally* BEST, *supra* note 102 (examining the past practice of handling the intelligence community's budget and whether those budgets should be publicly disclosed in the future).

266. Intelligence Reform and Terrorism Prevention Act of 2004, *supra* note 134.

267. *See supra* Parts III.E-F, IV.

268. *See supra* Parts III.F, IV.A.3, 5.

functions by attempting to legislate at least some aspects of the security classification process.

Similarly, Congress created the War Powers Resolution in an attempt to reign in the powers of the Executive under the Commander-in-Chief Clause and its associated historical construction without regard to the strictures of the Constitution or its Framers regarding the primacy of the Executive in military affairs.²⁶⁹ Although it has never been challenged in court, current and past members of Congress agree that the War Powers Resolution is inherently unconstitutional, and the signing statements of every President since Nixon indicate that this belief is shared by the executive branch regardless of party affiliation.²⁷⁰

Recent attempts by Congress to use its appropriations powers to force the Executive to change its stance on and course in the Iraq war²⁷¹ are current illustrations of the fact that the same mindset which created the War Powers Resolution still exists in Congress today and that it has become so seethingly anti-Executive that it threatens to undermine the role of the President as the arbiter of American national security policy, military policy, and foreign policy. Further, scant attention has been paid to the question of whether the current “war on terrorism” is in fact a “war” which the Congress can declare or seek to control through measures other than appropriations restrictions. Using the legal definition of a declaration of war requires that a nation declare war on another nation.²⁷² While the war on terror has effectively targeted the former regimes in Afghanistan and Iraq, the current phase of the war is truly fighting terrorists of all nationalities, who have flocked to an ideology rather than a flag. This issue has not been properly addressed as members of Congress from both political parties have eagerly attempted to denigrate the presidency rather than determining the bounds of their own constitutional abilities.

At the same time, Speaker of the House Nancy Pelosi recently ventured to Syria on what could be deemed a state visit and met with President Bashar Al-Assad²⁷³—the representative of a regime which has been targeted by the current President for its links to terrorism and

269. *See supra* Part III.E.

270. *See supra* Part III.E.

271. *See, e.g.*, Laura Smith-Spark, US Democrats Face War Funding Dilemma (May 25, 2007), <http://news.bbc.co.uk/2/hi/americas/6693339.stm>.

272. BLACK'S LAW DICTIONARY 415 (7th ed. 1999).

273. *See* Pelosi Receives Warm Welcome in Syria (Apr. 3, 2007), <http://www.cnn.com/2007/POLITICS/04/03/pelosi.syria/index.html>.

which has not historically been a strong U.S. ally—despite criticism and discouragement from the Administration against taking such a trip.²⁷⁴ When asked whether she would go to Iran—a nation with which the United States has even more fragile diplomatic relations, which is known to harbor terrorists who seek to kill American troops, and which is currently attempting to become a nuclear power to a chorus of international condemnation—to meet with its leadership, Speaker Pelosi refused to rule out such an excursion.²⁷⁵

As referenced above, the Senate confirmation process has gone from a given to a huge hurdle for several Presidents and nominees. Even for successful nominees, the process is arduous not only because of inquiry into credentials but also because of its often embarrassing focus on a multitude of personal detail about a nominee's life.²⁷⁶ Senators are unafraid to tell the President who he should and should not nominate, as evidenced by the recent decision of President G. W. Bush not to re-nominate General Peter Pace to the position of Chairman of the Joint Chiefs of Staff because of concern that the Senate would not confirm him.²⁷⁷ In another incident, Senators publicly informed President G. W. Bush's Administration of the characteristics they expected to see in his nominees to fill the seats on the Supreme Court vacated by Sandra Day O'Connor and the late William Rehnquist within hours of the time these seats became vacant.²⁷⁸ There is perhaps no more striking a way to demonstrate the overreach of the Congress into the executive branch than with this trend in confirmation history, because it has resulted in the exact situation which the Framers denounced in the Federalist Papers.²⁷⁹

During much of this same time period of congressional overreaching, Congress became more activist and attempted to extend the

274. White House Criticizes Pelosi's Planned Syria Visit, (Mar. 30, 2007), <http://www.cnn.com/2007/POLITICS/03/30/pelosi.trip/index.html>.

275. See Carla Marinucci, Pelosi, Lantos May Be Interested in Diplomatic Trip to Iran (Apr. 10, 2007), <http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/04/10/BAGV9P6C0S6.DTL>.

276. For example, during the recent confirmation hearings for now-Supreme Court Justice Samuel Alito, the inferences which some Senators attempted to draw from previous statements he made were such that they drove his wife from the hearing chamber in tears. See Bill Mears, Democrats Grill Supreme Court Nominee (Jan. 12, 2006), <http://www.cnn.com/2006/POLITICS/01/11/alito/index.html>.

277. Head of US Military 'Forced Out,' (June 15, 2007), <http://news.bbc.co.uk/2/hi/americas/6759115.stm>.

278. See Democrats Set for US Court Fight, (Nov. 1, 2005), <http://news.bbc.co.uk/2/hi/americas/4395668.stm>.

279. See *supra* Part II.C.

powers vested in it by the Constitution to combat social ills. Initially, these attempts centered on using the Commerce Clause to create desegregation and anti-racism statutes.²⁸⁰ These statutes were repeatedly challenged in federal court and sustained by the Supreme Court.²⁸¹ However, in the 1990s, Congress passed a series of laws attempting to regulate guns in school zones and liability for sexual assault incidents under the Commerce Clause, but these statutes were found to have exceeded the powers vested in Congress by the Commerce Clause and were overturned.²⁸² Other startling examples of congressional attempts to extend Congress' powers are found in the many instances in which Presidents use signing statements to indicate their problems with certain bills.²⁸³

Together, the above history paints the picture of a bipartisan effort to enlarge the powers and prerogatives of Congress at the expense of the powers vested in the Executive. Should it seem to readers that this is an unduly harsh indictment of Congress, one should also remember that many of the actions taken by Congress were the result of statutes signed into law by the sitting President who was given custodianship of the office and its powers. For whatever reason, many Presidents have ultimately acquiesced to laws which seek to undermine the executive branch and hope that the use of a signing statement will help them in the event of a legal challenge.

It is clear that the past century has seen erosion in respect to executive powers. This has damaged the Constitution and threatens to severely damage the executive branch at a time when a strong Executive is needed to guide the nation through the many threats it faces. Legally and practically, the boundaries of congressional involvement in the structure and any potential reorganization of the executive branch—especially in relation to national security and intelligence issues—ends with appropriations and confirmations for the additional reason that, when even these roles have been expanded, it is unlikely that the further involvement of the legislative branch in the executive branch will be productive or beneficial to the nation or its security.

280. *See, e.g.*, *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

281. *See id.*

282. *United States v. Morrison*, 529 U.S. 598, 602 (2000); *United States v. Lopez*, 514 U.S. 549, 551 (1995).

283. *See generally* HALSTEAD, *supra* note 60 (examining the history of presidential signing statements, their constitutional basis, and their legal effect).

PART VI—CONCLUSION

From the Framers to the voters, it is expected and understood that the President speaks for his country. In times of crisis, it is the President who addresses the nation. In times of sorrow, it is the President who seeks to comfort the nation. The perception of the President of the United States as “the most powerful man in the world” is still a common one anywhere across the globe. This is not because George Washington never told a lie, or was the general who helped secure our independence; it is not because FDR reassured the American public through his fireside chats; it is not because of the universally appealing idealism of President Kennedy’s tenure; or because of the image of President Ronald Reagan demanding the Berlin Wall come down. These men and their enduring images are the result of the Framers of the Constitution and the document which vested American Presidents with strong executive powers and intended for them to speak as the voice of the nation.

The idea of legislative branch involvement in the structure or reorganization of the executive branch beyond the appropriations and confirmation functions is inappropriate under constitutional law. It is especially inappropriate given the sustained modern trend of congressional self-enlargement at the expense of areas of executive prerogative which have historically been squarely within executive purview. And it is also inappropriate because it undermines the tenet that the President—and his office—function in a separate realm from the Legislature and form the one voice which represents America at law and war, in peace and mercy, throughout the course of history.

This Article has explained the history of the executive and legislative branches relative to each branch’s individual functions and to each other with an eye on the handling of national security, intelligence, military, and general foreign affairs policy. The aim of this Article is to demonstrate that the structure of the executive branch—and any attempts to reorganize it—are solely within the boundaries of the executive branch except for the role of Congress in appropriating funds to it and confirming various presidential nominees. This argument is advanced not because of a desire to afford one branch supremacy over another, but rather because attempts by Congress to enter into the realm of executive branch function hurts the Constitution, the executive branch, the legislative branch, and the nation as a whole.

